

90-982

No.

Supreme Court, U.S.

FILED

DEC 17 1990

JOSEPH P. SPANIOL, JR.
CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1990

RANBIR S. SAHNI, PETITIONER

v.

HARBOR INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD E. GREGG
Law Offices of Ronald E. Gregg
6 Hutton Centre Drive
Tower II, Suite 845
Santa Ana, California 92707
(714) 433-7850

{

{

{

QUESTION PRESENTED

Petitioner and The Federal Savings and Loan Insurance Corporation (FSLIC), having been appointed by the Federal Home Loan Bank Board as conservator of a FSLIC-insured state chartered institution, were sued in state court by California Union Insurance Company (Cal Union) seeking declaratory relief. The FSLIC removed the case to federal court. In federal court petitioner brought a third party claim based upon state law against Harbor Insurance Company (Harbor), not then a party to the declaratory relief action. The question presented is whether, in light of the holding in *Finley v. United States*, 490 U.S. 545, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989) there is subject matter jurisdiction under 12 U.S.C. 1730(k)(1) over a permissive third party claim to which the FSLIC is not a party, and as to which there is no independent federal jurisdiction.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes and Rules	1
Statement	2
Reasons for granting the petition	5
Conclusion	8
Appendix A	(1a)
Appendix B	(1b)

TABLE OF AUTHORITIES

Cases:

Federal Savings and Loan Insurance

<i>Corporation v. Ticktin</i> , 490 U.S. 82, 109 S.Ct. 1626, 104 L.Ed.2d 73 (1989)	4, 6
<i>Finley v. United States</i> , 490 U.S. 545, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989)	4, 5, 7, 8
<i>Mine Workers v. Gibbs</i> , 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)	7

Statutes and Rules

12 U.S.C. 1725(c)(4)	3, 6 2, 4,
12 U.S.C. 1730(k)(1)	5, 6
28 U.S.C. 1254(l)	1
28 U.S.C. 1345	3
Fed. R. Civ. Proc. 14	4
Fed. R. Civ. Proc. 20	4

In The Supreme Court of the United States
OCTOBER TERM, 1990

No.

RANBIR S. SAHNI, PETITIONER

v.

HARBOR INSURANCE COMPANY

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

The Law Offices of Ronald E. Gregg, on behalf of Ranbir S. Sahni, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, (1a)-(14a)) is reported at F.2d (1990). The district court did not render an opinion.

JURISDICTION

The judgment of the court of appeals (App., *infra*, (1a)-(14a)) was entered on September 17, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

Pertinent federal statutes and rules are set out in the appendix to this petition (App., *infra*, (1b)-(5b)).

STATEMENT

1. Before February, 1986, American Diversified Savings Bank (ADSB) was a savings and loan association chartered by the State of California and insured by the FSLIC. In that month, the Federal Home Loan Bank Board (Bank Board) appointed FSLIC to be the conservator of ADSB, pursuant to 12 U.S.C. 1729(c)(1)(B). Also in that month the FSLIC, acting as conservator for ADSB, brought suit in federal court against petitioner, a former director, officer and shareholder of ADSB, charging him with mismanagement of ADSB's affairs (FSLIC Claim).¹ Petitioner, the FSLIC and other interested parties thereafter made claims against California Union Insurance Company (Cal Union), Harbor Insurance Company (Harbor) and others who provided insurance to ADSB affording coverage for alleged misdeeds of ADSB's officers and directors. As a result, Cal Union sought to avoid coverage and brought suit in state court against petitioner, the FSLIC, Harbor and others for declaratory relief (Main Claim). The FSLIC did not cross-claim against Harbor and, on February 4, 1987, Cal Union dismissed Harbor from the Main Claim, with prejudice.

2. Thereafter, the FSLIC removed the Main Claim from state court to federal court pursuant to 12 U.S.C. 1730(k)(1), which was enacted as part of the Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, Sec. 102(a), 80 Stat. 1042. That section states:

Notwithstanding any other provision of law,
(A) the Corporation [FSLIC] shall be deemed to be
an agency of the United States within the meaning of
section 451 of title 28; (B) any civil action, suit, or
proceeding to which the Corporation shall be a party
shall be deemed to arise under the laws of the United

¹ The complaint alleges that petitioner and others violated various Bank Board regulations, breached their fiduciary duties, fraudulently transferred ADSB's assets and caused ADSB's insolvency.

States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and (C) the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect: *Provided*, That any action, suit or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investor, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States. ***

Excepting the limitations set forth in the proviso, Clause (C) of this section grants jurisdiction over the Main Claim, because FSLIC is a defendant in that action. Clause (A) of this section indirectly establishes jurisdiction under 28 U.S.C. 1345, which grants federal courts jurisdiction over suit brought by any agency expressly authorized to sue by Act of Congress. Under Clause (A) of this section and under 12 U.S.C. 1725(c)(4), FSLIC has the power to sue and be sued in federal courts.

3. In February, 1988, following removal of the Main Claim, the district court granted leave to petitioner alone to file a third party claim against Harbor based upon the doctrine of ancillary jurisdiction. Petitioner's third party claim against Harbor is based upon state law torts arising out of an insurance contract between Harbor and ADSB.² Harbor moved for summary judgment on petitioner's third party

² The third party claims alleged against Harbor in the Third Party Action seek money damages and are based upon tortious breach of the insurance contract and violation of California Insurance Code, Section 790.03.

claim and petitioner filed a cross-motion against Harbor for summary judgment.³ Although the FSLIC was not a third party plaintiff, defendant or intervenor with respect to petitioner's third party claim, the FSLIC nevertheless joined in petitioner's cross-motion against Harbor. The district court granted Harbor's motion for summary judgment and denied petitioner's cross-motion. Petitioner appealed this decision.

On appeal, for the first time, petitioner raised the issue of subject matter jurisdiction in light of the recent decision of *Finley v. United States*, 490 U.S. 545, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989).⁴

The United States Court of Appeals for the Ninth Circuit affirmed, holding that 12 U.S.C. 1730(k)(1) afforded sufficient basis for subject matter jurisdiction to support the summary judgment.⁵ The court stated (App., *infra*, (5a)) that 12 U.S.C. 1730(k)(1) was sufficiently broad to authorize the district court to exercise its discretion under Fed. R. Civ. Proc. 14 and 20. The court further reasoned (App., *infra*, (5a)) that the FSLIC had a "clear stake" in petitioner's third party claim because it appeared petitioner was attempting to make Harbor responsible for petitioner's potential liability under the FSLIC Claim. The court concluded (App., *infra*, (5a)) that the district court properly found petitioner's third party claim against Harbor was to be considered in the context of the Main Claim, to which it was closely related and, therefore, both should be heard together to avoid piecemeal litigation.

Relying upon *Federal Savings and Loan Insurance Corporation v. Ticktin* 490 U.S. 82, 109 S.Ct. 1626, 104 L.Ed.2d 73

³ Harbor contended that, as a matter of law, insurance coverage was not afforded under its policies because no notice of claim was given to Harbor during the applicable period.

⁴ The decision of *Finley* was announced on May 22, 1989, shortly after petitioner filed his Opening Brief before the court of appeals.

⁵ The court also held that the district court properly found petitioner had failed to meet his burden of establishing a genuine issue of material fact as to whether Harbor had actual notice of claims against him.

(1989), the court of appeals next held (App., *infra*, (5a)) that the purpose of 12 U.S.C. 1730(k)(1) permits federal courts to deal with all proceedings in which the FSLIC, is a party and to resolve competing claims in a single federal forum.

The court rejected (App., *infra*, (5a)) petitioner's contention that the decision in *Finley v. United States* required a finding of lack of subject matter jurisdiction over petitioner's third party claim.

REASONS FOR GRANTING THE PETITION

The court of appeals read Section 1730(k)(1) to extend federal jurisdiction from the Main Claim to petitioner's third party state law claim. It is respectfully submitted that reading is incorrect for several reasons. In light of the *Finley* decision it is important that the fundamental jurisdictional question presented by this case be resolved.

1. The court of appeals' decision is incorrect for at least four different reasons: (i) First, 12 U.S.C. 1730(k)(1) does not, by itself, expand federal jurisdiction to include third party state law claims made solely by and against persons who are otherwise completely independent from federal subject matter jurisdiction; (ii) Secondly, the FSLIC's joinder in petitioner's motion against Harbor based upon third party state law claims did not and could not, as a matter of law, retroactively confer subject matter jurisdiction where no independent basis of jurisdiction existed for the third party claim; (iii) Thirdly, considerations of judicial economy and convenience to the litigants are insufficient reasons, standing alone, to litigate federal claims together with factually similar state law claims in federal courts; (iv) Finally, the application of the principles announced in *Finley* with respect to pendent-party jurisdiction were effectively rejected by the court of appeals.

a. The purpose of 12 U.S.C. 1730(k)(1) is intended to permit federal courts to deal with all proceedings in which the

FSLIC is a party. (*Ticktin, supra*) A straightforward reading of the section does not expand federal jurisdiction to state law claims unless those claims are maintained by or against the FSLIC. Thus read, the section permits the exercise of federal jurisdiction only in proceedings where the FSLIC maintains, or defends against, a cognizable claim. The FSLIC's presence in the Main Claim does not make the FSLIC a party to petitioner's third party tort claims within the meaning of 12 U.S.C. 1730(k)(1). The FSLIC was not a third party plaintiff, nor a third party defendant nor did the FSLIC properly intervene in petitioner's third party claim against Harbor. If the FSLIC had wished to maintain a direct interest in petitioner's third party claim it could have attempted to intervene, but elected not to do so. The FSLIC made no effort to file its own cross-action or third party claim against Harbor. Without a direct interest in the third party claim asserted by petitioner against Harbor, 12 U.S.C. 1730(k)(1) does not operate to extend federal jurisdiction over that claim.⁶

b. The FSLIC's "joinder" with petitioner in his cross-motion for summary judgment against Harbor did not confer federal jurisdiction over the petitioner's third party claim under the circumstances presented here. The FSLIC's action of joining in a motion is not equivalent to the FSLIC's suing or being sued under 12 U.S.C. 1725(c)(4). The court of appeal concluded that the FSLIC had a "clear stake" in petitioner's third party claims because of petitioner's apparent aim to make Harbor responsible for satisfying the FSLIC's claims against him. (App., *infra*, (5a))

But the court's conclusion does not take into account the fact that FSLIC had failed to file any claim of its own against

⁶ The court of appeals has observed "[a]ssuming arguendo there may be cases in which FSLIC's presence as a named party may be insufficient to confer federal court jurisdiction over a controversy unrelated to FSLIC, FSLIC in this case was not merely a nominal party to the declaratory judgment action from which this appeal arises." (App., *Infra*, (5a))

Harbor and failed to attempt intervention in the third party claim. The fact that FSLIC's joinder in petitioner's cross-motion could be interpreted as FSLIC's manifest desire to see petitioner prevail in his third party claim does not extend federal jurisdiction to that claim. The FSLIC's "interest" in petitioner's cross-motion against Harbor therefore cannot result in the infusion of federal jurisdiction into petitioner's third party claim.

c. The court of appeals' view that avoidance of "piece-meal" litigation and "resolution of competing claims within a single federal forum," should be determining factors upon the issue of federal jurisdiction are likewise erroneous. (App., *infra*, (5a)) The *Finley* decision clearly points out that "mere factual similarity" between the operative facts of multiple claims does not justify the extension of federal jurisdiction to the instant case. Moreover, *Finley* teaches that "neither the convenience of the litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction."

d. The court of appeals also erred in holding that the decision in *Finley v. United Sates* did not require it to hold that the district court lacked jurisdiction over petitioner's third party claim against Harbor. The court of appeals apparently distinguished the decision in *Finley* from the instant case because *Finley* dealt with federal jurisdiction under the Federal Tort Claims Act (FTCA). (App., *infra*, (4a)) However, the principles announced in the *Finley* decision would apply to cases where, as here, a state law claim is asserted against a new party "over whom no independent basis of jurisdiction exists". And while it may be true that pendent-claim jurisdiction under the test announced in *Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) otherwise exists, the requirements for pendent-party jurisdiction set forth in *Finley* have not been met. In the instant case, petitioner sued Harbor as a "new" party, after Harbor had been previously dismissed from the Main Claim by Cal Union.

Petitioner's third party claim against Harbor is based completely upon state law. Unlike the FSLIC, Harbor is not an agency of the United States and has no special party status which confers federal jurisdiction over it. Since petitioner's third party claim is made against Harbor only, there is no "independent" basis of federal jurisdiction to support petitioner's claim as required by *Finley*.

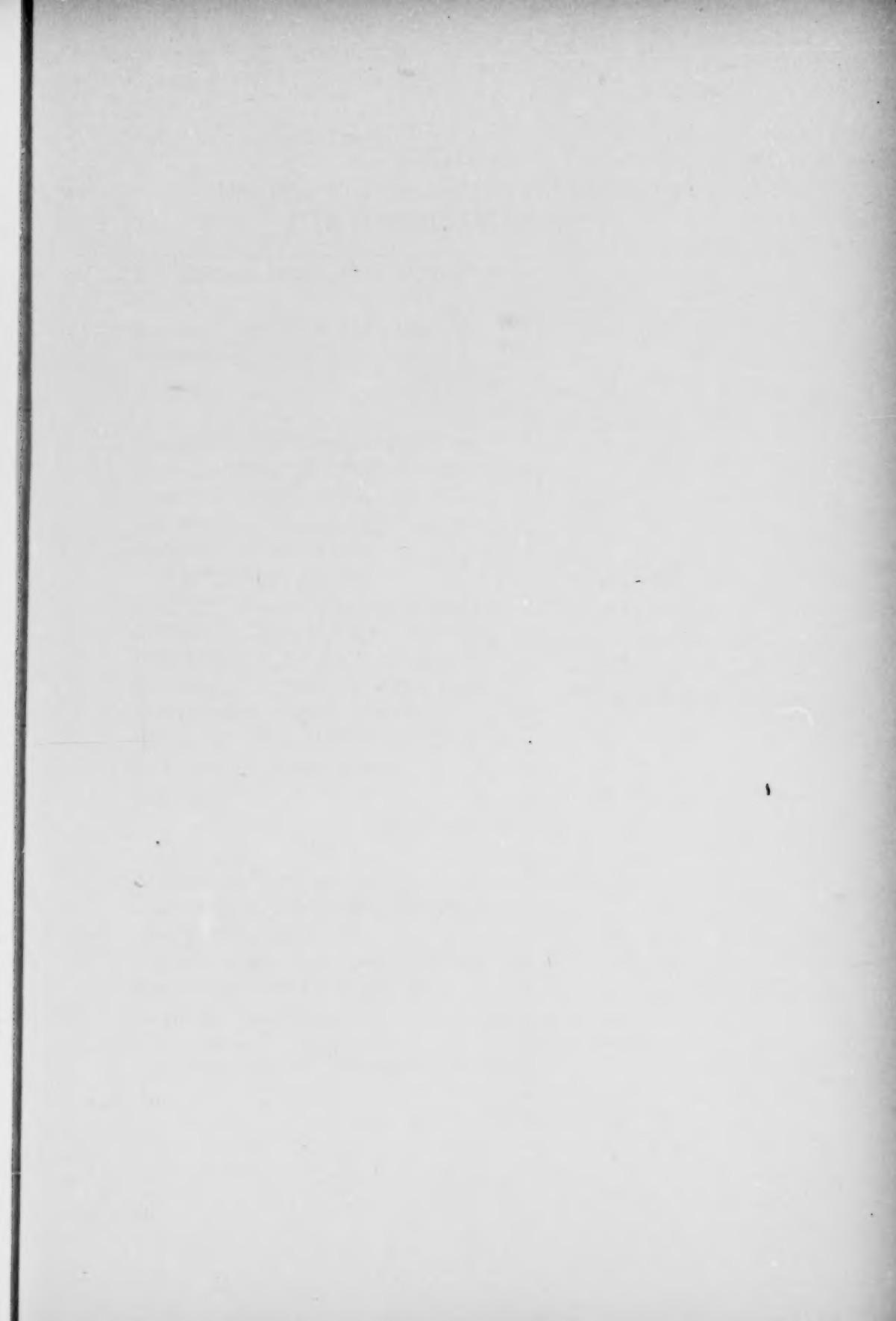
2. There is a substantial volume of litigation in the lower courts maintained by and against FSLIC and other agencies of the United States which have resulted in the filing of many third party claims over whom no "independent" basis of federal jurisdiction exists. This condition will likely continue if the decision of the court of appeals is not reversed. Those third party claims lacking an independent basis of federal jurisdiction could be litigated in state court thus relieving the federal system of a growing and unnecessary burden. This case is an appropriate one for this Court to apply the principles announced in *Finley* to jurisdictional statutes apart from the FTCA.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

RONALD E. GREGG
Law Offices of Ronald E. Gregg

December, 1990





APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA UNION INSURANCE
CO.;

PACIFIC-EMPLOYERS INSURANCE
COMPANY,

Plaintiffs.

v.

AMERICAN DIVERSIFIED SAVINGS
BANK; AMERICAN DIVERSIFIED
COMPANY; ADC FINANCIAL CORP.;
AMERICAN DIVERSIFIED PARTNERS;
AMERICAN DEVELOPMENT
CORPORATION; AMERICAN
DIVERSIFIED EQUITY CORPORATION;
LESTER G. DAY; MISSION NATIONAL
INSURANCE COMPANY; FEDERAL
INSURANCE COMPANY; FIREMAN'S
FUND INSURANCE COMPANY;
INDUSTRIAL INDEMNITY; AMERICAN
DIVERSIFIED INVESTMENT
CORPORATION,

Defendants.

and

AMERICAN DIVERSIFIED CAPITAL
CORPORATION; FEDERAL SAVINGS
AND LOAN INSURANCE
CORPORATION, AS CONSERVATOR
FOR AMERICAN DIVERSIFIED
CAPITAL CORPORATION,

and

No. 89-55013
D.C. Nos.
CV-88-0774-DT
CV-87-5659-DT
OPINION

RANBJR S. SAHNI,

*Third-Party
Plaintiff-Appellant,*

v.

HARBOR INSURANCE COMPANY,

*Third-Party
Defendant-Appellee,
and*

NATIONAL UNION-FIRE INSURANCE
COMPANY OF PITTSBURGH,
PENNSYLVANIA; CERTAIN
UNDERWRITERS AT LLOYDS,
LONDON,

Defendants/Cross-Defendants.

Appeal from the United States District Court
for the Central District of California
Dickran M. Tevrizian, District Judge, Presiding

Argued and Submitted
March 5, 1990—Pasadena, California

Filed September 17, 1990

Before: Procter Hug, Jr., Mary M. Schroeder and
Cynthia Holcomb Hall, Circuit Judges.

Opinion by Judge Schroeder

COUNSEL

Michael G. Dawe, Irvine, California, for the third-party
plaintiff-appellant.

Michael C. Denison, Kinsella, Boesch, Fujikawa and
Towle, Los Angeles, California, for the third-party defendant-
appellee.

(3a)

OPINION

SCHROEDER, Circuit Judge:

This appeal represents a small piece of major ongoing litigation over who should bear losses sustained in the collapse of still another thrift institution insured by the Federal Savings and Loan Insurance Corporation ("FSLIC"). Appellant here is Ranbir S. Sahni, a former director of American Diversified Savings Bank ("ADSB") who is seeking to hold the appellee, Harbor Insurance Company ("Harbor") liable for amounts he may be found to owe to FSLIC, ADSB's receiver.

FSLIC is pursuing its claims against Sahni and other directors in related litigation before the same district judge, and although FSLIC did not appeal the district court's section 54(b) ruling in favor of Harbor on Sahni's claim, it was a party in this case at the district court level and joined Sahni in his unsuccessful cross-motion for summary judgment against Harbor.

The issue on the merits is whether "claims made" insurance policies issued by Harbor to ADSB covered the claims in question. The two Harbor policies together were in effect from October 1, 1983, to March 1, 1985. Other companies had issued policies covering different periods of time. This case was originally instituted as a declaratory judgment action in state court by one of those insurance companies, California Union Insurance Company, against Sahni and FSLIC and, among other ADSB insurers, Harbor. FSLIC removed the action to federal court pursuant to 12 U.S.C. § 1730(k)(1), which establishes federal question jurisdiction for a "civil action, suit or proceeding to which [FSLIC] shall be a party," with provisos not here relevant.

JURISDICTION

We address a preliminary jurisdictional question. At the time of removal, the plaintiff in the declaratory judgment action has dismissed Harbor from the case because the plaintiff had concluded that Harbor's insurance policies did not

cover the claims in question. Sahni and FSLIC disagreed, however, and after removal, Sahni filed a "third-party complaint" against Harbor in order to bring it back into the case. FSLIC joined Sahni's cross motion for summary judgment against Harbor, the denial of which Sahni now appeals.

In response to our request for briefs on jurisdiction, the appellant Sahni now contends that the Supreme Court's recent decision in *Finley v. United States*, 109 S. Ct. 2003 (1989), requires us to hold that the district court lacked jurisdiction over Sahni's claim against Harbor.

The Supreme Court in *Finley* held that the grant of federal jurisdiction in the Federal Tort Claims Act ("FTCA") of claims against the United States was not broad enough to reach a complaint against other defendants. The grant of jurisdiction in 12 U.S.C. § 1730(k)(1)¹, however, is far

¹ This subsection provides:

(k) Jurisdiction and enforcement

(1) Notwithstanding any other provision of law, (A) the Corporation shall be deemed to be an agency of the United States within the meaning of section 451 of Title 28; (B) any civil action, suit, or proceeding to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and (C) the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect: **Provided**, That any action, suit, or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States. No attachment or execution shall be issued against the Corporation or its property before final judgment in any action, suit, or proceeding in any court of any State or of the United States or any territory, or any other court.

12 U.S.C. § 1730(k)(1).

(5a)

broader than the grant of jurisdiction for a claim against the United States under the FTCA. The FSLIC statute establishes federal jurisdiction over any proceeding to which FSLIC is a party. Assuming arguendo there may be cases in which FSLIC's presence as a named party may be insufficient to confer federal court jurisdiction over a controversy unrelated to FSLIC, FSLIC in this case was not merely a nominal party to the declaratory judgment action from which this appeal arises. FSLIC also has a clear stake in Sahni's claim against Harbor, since Sahni's aim is to make Harbor responsible for satisfying FSLIC's claims against Sahni. FSLIC's interest is demonstrated by the fact that FSLIC joined Sahni in his motion for summary judgment.

Unlike the grant of jurisdiction under the FTCA, section 1730(k)(1) is not limited to claims against the United States. The grant of jurisdiction in section 1730(k)(1) is broad enough to authorize the district court to exercise its discretion pursuant to the Federal Rules to permit this claim to be considered in the context of a declaratory judgment action designed to determine issues of insurance coverage. *See Fed. R. Civ. Proc. 14, 20.* The court properly found Harbor's joinder appropriate, over no objection. It did so, agreeing that Sahni's claims against Harbor were "so closely related to the main claim that for reasons of justice in order to avoid piecemeal the litigation claims should be heard together." The conclusion is in harmony with the purpose of section 1730(k)(1) which is intended to permit federal courts to deal with all proceedings in which FSLIC, when it is acting as an agency of the United States, is a party. *See Federal Savings and Loan Ins. Corp. v. Ticktin*, 109 S. Ct. 1626 (1989). The statute is intended to permit resolution of competing claims in a single federal forum. The narrow interpretation now proffered by appellant would make that impossible.

We therefore turn to the merits of the appeal.

The Policies

Each of the Harbor policies were "claims made" policies. In relevant part each of them provided that Harbor shall pay on behalf of the insured "loss . . . arising from any claim or claims made against the insureds . . . during the policy period by reason of any wrongful act . . ." The term "loss" is defined as "any amount an insured is obligated to pay in respect of this legal liability whether actual or asserted, for a wrongful act . . ." This amount includes "damages, judgments, settlements and costs, charges and expenses incurred in the defense of actions, suits or proceedings and appeals therefrom . . ." "Wrongful act" is defined as:

Any breach of duty, neglect, error, misstatement, misleading statement, omission or other act done or wrongfully attempted by the insureds or any of the foregoing so alleged by any claimant or any matter claimed against them solely by reason of their being such directors or officers of the corporation.

The policies provided coverage for claims made during the policy period and after the policy period ended, so long as the notice of the potential claim was given to Harbor within the policy period.

The "policy period" began October 1, 1983, and ended March 1, 1985. This dispute arises because FSLIC's lawsuit against Sahni, setting forth the claims he now asserts are covered by Harbor, was not filed until 1986. The issues in this dispute which we must resolve thus concern whether communications between various parties during the policy period amounted to "claims made." We must also determine whether there should have been further discovery or other proceedings to permit appellant to show there was sufficient notice within the policy period of a potential claim within the meaning of the policy provisions.

(7a)

Background

On March 26, 1984, ADSB received from the Federal Home Loan Bank Board ("FHLBB") a letter informing the Bank that it had not been timely in filing its monthly financial reports; fault had been found with ADSB's accounting system; and, the FHLBB did not have full confidence in the integrity of ADSB's records. The letter requested that ADSB take immediate action to remedy the situation.

On or about April 6, 1984, the California Department of Savings and Loan ("CDSL") issued a Cease and Desist Order prohibiting ADSB from investing in or transferring to its service corporations any of the assets of ADSB until an investigation had been completed. This order was a result of ADSB's accounting procedures.

In June of 1984, Sahni was advised by FSLIC and CDSL that ADSB was guilty of specified statutory and regulatory violations and that FSLIC intended to initiate formal regulatory enforcement proceedings unless the Board of Directors of ADSB consented to enter into a supervisory agreement with FSLIC and CDSL. That same month, on June 20, ADSB entered into a Supervisory Agreement with FSLIC. Under this Agreement the FSLIC agreed to forbear instituting formal cease-and-desist proceedings. In exchange, ADSB agreed to dispose of noncomplying loans, provide an accurate accounting, and otherwise bring itself into compliance with applicable regulations.

On July 6, 1984, CDSL ordered a special examination of ADSB under California's Financial Code § 8154(a). This examination required ADSB to pay the expense of bringing in independent auditors to complete the investigation. CDSL also claimed that ADSB had still failed to comply with the terms of the Supervisory Agreement of June 20, 1984.

In September, 1984, FHLBB requested information from ADSB on contingency plans in the event that ADSB sustained any sudden unplanned withdrawal of deposits.

(3a)

On October 6, 1984, which was still within the period covered by a Harbor policy, CDSL rescinded its cease-and-desist order, subject to ADSB's acceptance of three conditions:

- (1) ADSB was to maintain a net worth of at least five percent of its total assets;
- (2) ADSB's aggregate investment in its service corporations was not to exceed sixty percent of ADSB's total assets until further order of the Commissioner; and
- (3) ADSB was to take "necessary corrective action" as recommended by its statutory auditors in the report of Management Audit.

Finally, on February 14, 1986, after the Harbor policy period had ended, the FHLBB determined that ADSB was insolvent, appointed the FSLIC as the conservator, and the FSLIC filed suit against Sahni and others for alleged breaches of duty committed while directors of ADSB. The lawsuit against Sahni alleged that he individually breached his fiduciary duty of due care to ADSB by failing to maintain accurate and adequate records of transactions and he maintained a conflict of interest with ADSB's subsidiaries and other companies owned or controlled by him.

On April 23, 1986, Sahni's counsel requested coverage by Harbor under the policies. On April 29, 1986, Harbor denied any coverage obligation based on the fact that the FSLIC lawsuit was filed after the expiration of the policies.

Were Any Claims Made?

Although an actual lawsuit against Sahni was not filed until February 19, 1986, Sahni argues that letters from the FHLBB detailing ADSB's deficiencies and requesting immediate action by the directors of ADSB were actually "claims made" within the meaning of the insurance policies. We disagree.

We review a grant of summary judgment *de novo*. *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989). The parties agree that California law

(9a)

applies to the interpretation of the Harbor policies. We are bound to follow an interpretation by the California Supreme Court of California law. *See, e.g., West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 236 (1940).

Sahni's first contention is that "claims-made" policies are ambiguous and therefore "coverage must be found if it is available under any reasonable interpretation of the policy." California courts, however, have never found claims-made policy provisions to be ambiguous. The rulings are to the contrary. *See, e.g., Gyler v. Mission Ins. Co.*, 10 Cal.3d 216, 219-220, 514 P.2d 1219, 1221, 110 Cal. Rptr. 139, 141 (1973) (noting that the phrase "claims made" is not ambiguous); *Phoenix Ins. Co. v. Sukut Const. Co., Inc.*, 136 Cal.App.3d 673, 677, 186 Cal. Rptr. 513, 515 (1982) ("a claim . . . is a demand for something as a right, or as due."); *Williamson & Vollmer Engineering v. Sequoia Ins. Co.*, 64 Cal.App.3d 261, 269-70, 134 Cal. Rptr. 427, 431 (1976) ("the term imports the assertion, demand or challenge of something as a right; the assertion of a liability to the party making it to do some service or pay a sum of money . . . a 'claim' refers to a debt due the claimant. It is a money demand."); (citations omitted); *San Pedro Properties, Inc. v. Sayre & Toso, Inc.*, 203 Cal.App.2d 750, 21 Cal. Rptr. 844 (1962); *see also Hoyt v. St. Paul Fire & Marine Ins. Co.*, 607 F.2d 864, 867 (9th Cir. 1979) ("the 'claim' contemplated is unambiguously in the nature of a demand or notice"). Thus, California courts would not hold that a claims-made policy is inherently ambiguous, but rather that the term must be interpreted as any other contract term. *See Producers Dairy Delivery Co. v. Sentry Ins. Co.*, 41 Cal.3d 903, 912, 718 P.2d 920, 928, 226 Cal. Rptr. 558, 566 (1986); *Hallmark Ins. Co. v. Superior Court*, 201 Cal.App.3d 1014, 1019-20, 247 Cal. Rptr. 638, 643-44 (1988); *Employers Reinsurance v. Phoenix Ins. Co.*, 186 Cal.App.3d 545, 555, 230 Cal. Rptr. 792, 802 (1986).

Notwithstanding the unambiguous nature of the policy, Sahni asserts that the various letters from the FHLBB and

CDSL constituted "claims made" under the policy. None of the communications to Sahni or APSB during the policy periods amounted to any assertion of liability on their part for any conduct under investigation.

The CDSL management order of July 6, 1984, and the two letters of April 6 and October 6, 1984 pertaining to CDSL's cease-and-desist orders do not assert claims because they neither threatened formal proceedings against Sahni as a consequence of failure to comply nor propose to hold the officers and directors personally liable for the deficiencies. CDSL's cease-and-desist order did not state any formal consequences for ADSB's failure to comply with the order. Similarly, CDSL's order requiring ADSB to submit to a management audit stated that the audit's purpose was to aid ADSB's compliance with the necessary regulations, and did not threaten any formal consequences for failure to comply. Finally, although the FSLIC agreement stated that the Board had agreed to take certain actions in return for FSLIC's "forbearance" from formal cease-and-desist proceedings against the institution, no formal action was threatened against the officers or directors as a consequence of breaching the agreement.

We considered a similar factual situation in a case construing Arizona law. In *Hoyt v. St. Paul Fire & Marine Ins. Co.*, 607 F.2d 864 (9th Cir. 1979), a letter was sent to the insured, an attorney, accusing him of gross negligence in preparing a will and demanding from him "all sums paid or which may hereafter become due or payable by the estate." Subsequent to receiving the letter, but after the malpractice insurance policy expired, suit was brought by the estate against the attorney. This court held that the policy did not provide coverage:

[i]n our judgment the letter of April 5, 1974 did not constitute a claim. It was a request for information and explanation. If Hoyt was put on notice of any kind it was only that a claim *might* be expected to

follow if the estate attorney was not satisfied with the explanation. In our view an inquiry cannot be transformed into a claim or demand depending in each case on the reasonable expectations of the insured — whether he should reasonably have been satisfied that the explanation would be accepted as justification for the questioned conduct or should reasonably have expected that it would not. Such a rule would firmly write uncertainty of coverage into every policy.

Id. at 866 (emphasis added). *Hoyt* was favorably cited in *Employers Reinsurance*, 186 Cal.App.3d at 555 (1986), where the California court held that a complaint and summons were claims. *Id.*

There are conflicting district court decisions applying California law, however. Compare *Burns v. International Insurance Co.*, 709 F. Supp. 187 (N.D. Cal. 1989), with *Mt. Hawley v. Federal Savings & Loan Insurance Corp.*, 695 F. Supp. 469 (C.D. Cal. 1987). The district court in *Burns* held that a FSLIC investigation and Supervisory Agreement did not, by themselves, give rise to a claim, but were occurrences "that might subsequently give rise to a claim." *Id.* at 189. The rationale of *Burns* is persuasive. The term "claim" should not be interpreted so broadly as to include a regulatory agency's request of the insured to comply with regulations where, as here, the agency did not directly threaten ADSB with liability, it made no "money demand," *Williamson*, 64 Cal.App.3d at 269-70, or "demand or challenge [] something as of right." *Id.*; *Phoenix Ins.*, 136 Cal.App.3d at 677; see also *MGIC Indem. Corp. v. Home State Sav. Ass'n*, 797 F.2d 285, 288 (6th Cir. 1986)(assertion that a "wrongful act" has occurred is "not the same thing as a claim for payment on account of a wrongful act"; a claim for payment is required to invoke coverage). Under California law, no "claim" was made. See *Guyler, Williamson & Vollmer Engineering*.

Was There a Viable Contention that Harbor had Notice of a Potential Claim?

Subsection 7(C)II² of the policies allows in effect coverage for claims made after the policy period if notice of a potential claim is given to Harbor within the policy period. Sahni argues that the district court erred in concluding that Sahni had not established a genuine issue of material fact as to whether Harbor had received notice. Sahni also argues that the district court erred in refusing additional discovery under Federal Rule of Civil Procedure 56(f) to depose Harbor regarding its "actual knowledge" of these potential claims. We reject these contentions.

The first issue Sahni raises is whether Harbor received timely notice of the regulatory activity which would trigger the policies "potential claims" protection. Sahni acknowledges that the insureds had not personally given Harbor notice. He argues that we should hold Harbor nevertheless had sufficient constructive notice because, according to Sahni, Harbor had documents which should have alerted it to the existence of a potential claim.

² This section provides:

(C) If during the policy period:

- (i) The corporation or the insureds shall receive written or oral notice from any party that it is the intention of such party to hold the insureds responsible for the results of any specified wrongful act by the insureds while acting in the capacities aforementioned; or
- (ii) The corporation or the insureds shall become aware of any occurrence which may subsequently give rise to a claim being made against the insureds in respect of any such wrongful act;

and shall in either case during such period give written notice to the company of the receipt of such written or oral notice under (i) above or of such occurrence under (ii) above, then any claim which may subsequently be made against the insureds arising out of such wrongful act shall for the purpose of this policy be treated as a claim made within the period of this policy. (emphasis added).

(13a)

We decline Sahni's invitation to adopt a "constructive notice" theory in this case. First, the principal documents relied upon would not have alerted Harbor to anything Sahni considered to be a potential claim. Sahni relies on a letter to ADSB from ADSB's insurance broker, James Econn & Co., for the assertion that Harbor may have received notice of the regulatory actions by way of some source other than ADSB itself. The letter merely asserts that certain aspects of ADSB's financial condition were making it difficult for the broker to obtain adequate insurance for the S&L. Sahni also claims that "[d]ocumentation such as annual reports, interim reports, 10k reports, proxy materials, and other documentation relating to ADSB's net worth and its level of brokered deposits" would have alerted Harbor to ADSB's regulatory problems. There is no assertion that this information included any reference to the regulatory agencies' investigations. In addition, the policies specifically required the insureds to notify Harbor of potential claims. Sahni did not allege before the district court that he or any other insured provided any information to Harbor that would alert the insurance company as to a "potential claim." Sahni's reliance on *Local 38 v. Aetna Cas. & Sur. Co.*, 790 F.2d 1428 (9th Cir. 1986), amended, 811 F.2d 500 (1987), is therefore misplaced. In *Local 38*, the insured provided its insurer with a Department of Labor 5500 form and an audit of the insured. These reports showed "that the Department of Labor had been auditing the trust fund since 1971." *Id.* at 1429. We held the material contained in the reports to be sufficient to bring to a jury the question of whether the information constituted "notice" to the insurer. Here there was no similar information provided by the insured to the insurer suggesting a potential claim.

Thus, the district court did not err by finding that Sahni failed to meet his burden of establishing a genuine issue of material fact as to whether Harbor had actual notice of "potential claims" against Sahni. See *Burns*, 709 F. Supp. at 191 (denying coverage because insured parties failed to notify insurer of potential claims based on the regulatory activity

until several months after the policy term had ended); *see also Tzung v. State Farm Fire and Cas. Co.*, 873 F.2d 1338, 1342 (9th Cir. 1989)(summary judgment proper where no coverage as a matter of law under insurance policy); *Hallmark*, 201 Cal.App.3d at 1020 (same).

There is one remaining contention. Sahni argues that the district court abused its discretion by refusing to allow him additional time to depose Harbor before deciding the motion for summary judgment.

The district court has discretion to continue a motion for summary judgment if the opposing party needs to discover essential facts. Fed. R. Civ. P. 56(f); *Garrett v. City and County of San Francisco*, 818 F.2d 1515, 1518 (9th Cir. 1987). The district court does not abuse its discretion by denying further discovery if the movant has failed diligently to pursue discovery in the past, *Mackey v. Pioneer National Bank*, 867 F.2d 520 (9th Cir. 1989), or if the movant fails to show how the information sought would preclude summary judgment, *Hall v. State of Hawaii*, 791 F.2d 759, 761 (9th Cir. 1986).

Here, Sahni sought to continue the summary judgment disposition long enough to depose a Harbor representative on the question of whether Harbor had had "actual knowledge" of claims made against Sahni. However, no actual "claims" were made during the policy period as a matter of law. The deposition could not have produced any new information material to the issue of whether Harbor had notice of "claims made" during the policy periods.

Sahni also asserts that the deposition could have produced information showing that Harbor had "actual knowledge" of "potential claims" during the policy period. Again, since all written communications to Harbor had already been produced, and these did not indicate that Harbor had received any notice of potential claims, there was no likelihood of material new information being disclosed at the deposition.

(15a)

Therefore, Sahni failed to assert any basis on which the district court should have granted his Rule 56(f) request, and the district court did not abuse its discretion by denying it. *See Mackey*, 867 F.2d at 524; *Hall*, 791 F.2d at 761.

AFFIRMED.



APPENDIX B

STATUTORY AND RULE APPENDIX

12 U.S.C. 1725 provides in pertinent part:

Creation of Federal Savings and Loan Insurance Corporation

(a) Creation, operation, and offices

There is created a Federal Savings and Loan Insurance Corporation (hereinafter referred to as the "Corporation"), which shall insure the accounts of institutions eligible for insurance as hereinafter provided, and shall be under the direction of the Federal Home Loan Bank Board and operated by it under such bylaws, rules, and regulations as it may prescribe for carrying out the purposes of this subchapter. The principal office of the Corporation shall be in the District of Columbia.

* * * * *

(c) Powers

On June 27, 1934, the Corporation shall become a body corporate, and shall be an instrumentality of the United States, and as such shall have power-

- (1) To adopt and use a corporate seal.
- (2) To have succession until dissolved by Act of Congress.
- (3) To make contracts.
- (4) To sue and be sued, complain and defend, in any court of competent jurisdiction in the United States or its Territories or possessions or the Commonwealth of Puerto Rico, and may be served by serving a copy of process on any of its agents or any agent of the Federal Home Loan Bank Board and mailing a copy of such

(1b)

(2b)

process by registered mail or by certified mail to the Corporation at Washington, District of Columbia.

* * * * *

12 U.S.C 1730(k)(l) provides:

Jurisdiction and enforcement

Notwithstanding any other provision of law, (A) the Corporation shall be deemed to be an agency of the United States within the meaning of section 451 of Title 28; (B) any civil action, suit, or proceeding to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and (C) the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect: *Provided*, That any action, suit, or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States. No attachment or execution shall be issued against the Corporation or its property before final judgment in any action, suit, or proceeding in any court of any State or of the United States or any territory, or any other court.

Federal Rule of Civil Procedure 14 provides in pertinent part:

Third-Party Practice

(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint

(3b)

to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counter-claims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, the claimant of the property arrested.

* * * * *

(4b)

Federal Rule of Civil Procedure 20 provides in pertinent part:

Permissive Joinder of Parties.

(a) **PERMISSIVE JOINDER.** All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

* * * * *

U.S.C. 1254(l) provides:

Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree:

* * * * *

(5b)

28 U.S.C. 1345 states:

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.